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(3)



# In the Supreme Court of the United States

OCTOBER TERM, 1968

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No. 776

UTAH PUBLIC SERVICE COMMISSION, APPELLANT

v.

EL PASO NATURAL GAS COMPANY, ET AL.

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR  
THE DISTRICT OF UTAH

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## MEMORANDUM FOR THE UNITED STATES

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This memorandum is submitted in response to the Court's order of April 21, 1969, inviting the Solicitor General to express the views of the United States with respect to the motion of appellant to dismiss the appeal under Rule 60 of the Rules of this Court.

The United States has no objection to the granting of the motion to dismiss the appeal. For the information of the Court, there is reproduced, as an appendix to this memorandum, the Motion to Affirm the judgment of the district court which we had prepared as a response to the appellant's Jurisdictional Statement and which was about to be sent to the printer when the appellant moved to dismiss its appeal. It then became our understanding that no Motion to Af-

firm would be received. The Motion is now submitted,  
without change.

Respectfully submitted.

ERWIN N. GRISWOLD,  
*Solicitor General.*

APRIL 1969.

## APPENDIX

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No. 776

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR  
THE DISTRICT OF UTAH

MOTION TO AFFIRM

Pursuant to Rule 16(1)(c) of the Rules of this Court, the United States moves that the judgment of the district court be affirmed.

### STATEMENT

In *United States v. El Paso Natural Gas Co.*, 376 U.S. 651, this Court held that the acquisition in 1957 of the stock and assets of Pacific Northwest Pipeline Corporation by El Paso Natural Gas Company (hereafter "El Paso") violated Section 7 of the Clayton Act, because it might substantially lessen competition in the sale of natural gas in California. It directed the district court "to order divestiture without delay." 376 U.S. at 662. On remand, the government and El Paso entered into a consent decree which would have transferred the illegally acquired assets to a newly formed

company. This Court set aside the decree on the ground that it did not carry out the mandate of *El Paso*, and again directed divestiture without delay. *Cascade Natural Gas Corp. v. El Paso Natural Gas Co.*, 386 U.S. 129. It also suggested guidelines for an appropriate decree.

These guidelines were (1) that the gas reserves to be divested should be "no less in relation to present existing reserves than Pacific Northwest had when it was independent; and the new gas reserves developed since the merger must be equitably divided between El Paso and the New Company," 386 U.S. at 136-137; (2) that the district court determine whether the new company would need the proceeds of the sale of the stock of West Coast Transmission Co., which El Paso had acquired in the merger, in order to have the resources necessary to compete in the California market and whether the new company should receive remuneration for El Paso's use of some \$53 million in tax loss carry-overs acquired from Pacific Northwest, 386 U.S. at 138; and (3) that conditions must be imposed to make sure that the new company would be completely independent of influence by El Paso, conditions which might possibly include a sale of the stock of the new company to outside interests, 386 U.S. at 141.<sup>1</sup>

The basic properties to be divested are the former properties of Pacific Northwest Pipeline Corporation, which after the illegal acquisition became El Paso's Northwest Division. The Northwest Division operates some 1500 miles of pipeline running northwest from Durango, Colorado to its principal markets in Wash-

<sup>1</sup> The Court also ordered that a different district judge be assigned to conduct the additional hearings. 386 U.S. at 142-143. Pursuant to this direction the proceedings on remand were conducted by Judge Chilson.

ington, Oregon, and Idaho.<sup>2</sup> It has assets of \$252.6 million, 1968 sales of slightly more than \$120 million and estimated 1968 net income after federal taxes of \$8 million. (El Paso Divestiture Plan, pp. 4-5, 10, tab. 13.)

On the second remand twenty-two parties intervened, including state utility commissions and interested gas and electric companies, and nine firms sought to acquire the Northwest Division properties. The district court chose Colorado Interstate Gas Co. (now known as Colorado Interstate Corp.; hereafter "CIG") (J.S. App. 37-130).<sup>3</sup>

CIG is a growing corporation with assets in excess of \$260 million. Its original business was the operation of a natural gas transmission system on the eastern slope of the Rocky Mountains, but it has recently diversified into petroleum, fertilizer and machinery enterprises. Its principal gas market is in the Denver-Colorado Springs area. Eighty percent of its gas comes from the Anadarko (Hugoton and Panhandle) Basin in Kansas, Oklahoma and Texas, east of the Rocky Mountains, although it also draws some gas eastward from Wyoming fields. In 1966 it had operating revenue of \$155 million, 48 percent of which was derived from pipeline operations, and a net income of \$12,600,000. Between 1952 and 1966 CIG's gas sales have approximately doubled and its gas

<sup>2</sup> The Northwest Division also serves these markets with gas supplies drawn from Canadian sources through a connection at Saumas, Washington and through Pacific Gas Transmission lines at Kingsgate, Idaho. The Division also has smaller customers in Colorado, Wyoming and Utah.

<sup>3</sup> The court distributed a tentative opinion on June 21, 1968, and permitted parties to make objections to its findings and conclusions (J.S. App. 37-124). On August 29, the court slightly modified its opinion and made its decision final (J.S. App. 125-128). On November 7, it granted El Paso's timely motion to amend the judgment to permit El Paso to retain certain non-utility investments it had obtained in the merger (J.S. App. 129-130).

revenues have increased from \$18 million to \$74 million. In that period it has made approximately \$172 million worth of improvements to its pipeline systems. (Tr. 2549-2552, 2650; CIG Divestiture Plan, pp. 18-19, Ex. 1.)

CIG has never independently attempted to supply the Northwest or California markets. In 1958, however, it joined with El Paso in the so-called "Rock Springs" project, in which it proposed to supply gas which El Paso would sell to its California customers. CIG at that time had a serious problem of oversupply while El Paso was seeking Rocky Mountain reserves to supply its rapidly expanding Southern California market. CIG was to construct a 155-mile line from its existing terminus near Rock Springs, Wyoming, to Provo, Utah, where it would connect with a line to be constructed by El Paso southwest to the California border. The Federal Power Commission rejected the application on the ground that no immediate need for new pipelines had been shown, that other ways of bringing gas to California were less costly and that other alternatives were available for expansion to meet future California market needs. 30 F.P.C. 77 (Tr. 2555-2556).

None of the eight other applicants for acquisition operates a natural gas pipeline. All had been formed for the purpose of acquiring the Pacific Northwest properties, although one of them, the Rosenblatt-Husky Group, includes Husky Oil Company, an operating oil producer (Tr. 6575-6578). Each of these applicants submitted proposed plans for divestiture, six of which contemplated meeting the new company's working capital needs out of the proceeds of the West Coast Transmission stock. (See J.S. App. 57-64.)

As a standard for selection, the court declared that it should choose the applicant that is "best qualified

to make New Company a serious competitor" in the California market (J.S. App. 96). It found that entry into the California market would be much more difficult today than in 1957 because of (1) El Paso's growth, (2) the entry during this period of an additional out-of-state supplier into both the Southern and the Northern California markets, and (3) the possible consequences of pending Federal Power Commission proceedings for construction of new pipelines from Texas to California (J.S. App. 94-96). It therefore believed that, "[b]ecause of the present competitive situation, time is of the essence" (J.S. App. 97).

The court chose CIG because it was "the only applicant which has a presently functioning organization with experienced management and personnel which gives it the capability to restore New Company to a competitive position in a much shorter period of time than could be done by any other applicant" (J.S. App. 97). It held that CIG was not disqualified as a potential competitor in California because "CIG, standing alone, has little chance of affecting competition for the California market \* \* \*" (J.S. App. 101). On the other hand, the court found that "of the alternatives available, the combination of CIG and the New Company will create the strongest competitive potential for the California market" (J.S. App. 101).

Pursuant to the court's directions, El Paso and CIG negotiated agreements to implement the divestiture plan.<sup>4</sup> El Paso is to divest Northwest Pipeline Corporation ("New Company"), to which it will transfer all the operating facilities, reserves, and

<sup>4</sup> These agreements were approved by the district court on November 7, 1968, in an order overruling objections to the Implementing Documents. The Implementing Documents are included in the record.

other assets to be divested (Implementing Documents, "Agreement," pp. 2-3, 9-11, 14-15).<sup>5</sup> El Paso will receive five million shares of New Company non-voting preferred stock which can be converted to CIG common stock after a period of five years (*id.* at 7).<sup>6</sup> CIG will acquire all of the New Company's common stock in exchange for \$5 million in cash and approximately 1,750,000 new shares of CIG common stock to be held by the New Company to cover the conversion rights of the New Company preferred to be issued to El Paso (*id.* at 8, Ex. III).

The agreements contain detailed provisions to insulate both the New Company and CIG from El Paso control. The New Company preferred stock may not be converted into common stock by El Paso, by its affiliates or by officers or directors thereof; by persons who own, control or have power to vote in excess of  $\frac{1}{2}$  of 1 percent of the outstanding El Paso common stock; by members of the immediate family of any officer or director or of any such person; or by persons acting in their behalf or in concert with them. In addition, no officer or director of El Paso or its affiliates may purchase or retain more than  $\frac{1}{10}$  of 1 percent of the outstanding common stock of CIG or New Company for a period of ten years; and no person who individually, or together with members of his immediate family or with any other person with whom he is in concert, owns or controls more than  $\frac{1}{2}$  of 1 percent of the outstanding common stock of El Paso

<sup>5</sup> The New Company will assume the Northwest Division's pro-rata share of El Paso's system-wide bond and debenture indebtedness; as of Dec. 31, 1967, this was approximately \$170 million (El Paso Plan, p. 11 & tab. 17; Implementing Documents, "Agreement," pp. 6, 11-12).

<sup>6</sup> The preferred stock will pay a dividend of \$1.20 per year for the first five years and \$1.00 per year thereafter (Implementing Documents, "Agreement," p. 7).

may own more than 5 percent of the outstanding common stock of CIG. El Paso and its affiliates are prohibited from acquiring any CIG or New Company stock subsequent to the divestiture. Finally, El Paso is prohibited from having common officers or directors with New Company or CIG. (Implementing Documents, "Restrictive Provisions," pp. 1-5.)

Under the plan, El Paso will transfer to the New Company some 9.2 trillion cubic feet of gas reserves, with a 27-year reserve life index and a 12-year deliverability life, from Canadian, Rocky Mountain, and San Juan Basin sources (J.S. App. 67-69). The court determined that the 21.8 percent of the San Juan Basin reserves that El Paso will divest to the New Company, were "no less in relation to present existing reserves than [Pacific Northwest] had when it was independent \* \* \*" (J.S. App. 76). The court also noted that the New Company will receive more than 50 percent of the net additions to the reserves developed since the acquisition (J.S. App. 76). While the court recognized that the total reserves of the New Company would not themselves be sufficient to meet both the Northwest Division's existing requirements and those of a California project, it concluded that reduction of the reserves dedicated by El Paso to its Southern Division would be inequitable (J.S. App. 77-78). The court found that under CIG's experienced management the New Company could obtain additional reserves from other sources "to support its competition in the California market" (J.S. App. 81).

El Paso also had acquired from Pacific Northwest substantial investments, including substantial numbers of shares of the stock of West Coast Transmission Company, a Canadian company supplying gas to Pacific Northwest, and of Northwest Production Company,

a production company operating in the San Juan Basin and the Permian Basin; and various other properties and investments, including the Northwest Division's headquarters building in Salt Lake City and a 49-percent stock interest in Phillips Pacific Chemical Company, a fertilizer company. Since CIG did not want the West Coast Transmission or Northwest Production Company stock and since it can independently supply the New Company with working capital, the court did not require El Paso to divest these stocks to CIG. It did, however, require El Paso to dispose of these stocks to a satisfactory purchaser, because both of these companies supply gas to the New Company. (J.S. App. 83-84.)<sup>1</sup> The court ruled that the New Company should not be reimbursed for the tax losses acquired by El Paso since these had "in great measure" been passed on to customers of the Northwest Division in the form of lower rates (J.S. App. 84-86).

Following the decision of the district court, El Paso and the New Company filed applications with the Federal Power Commission for permanent certification of the New Company to operate the Pacific Northwest facilities. FPC Docket CP-69-67, *et al.* At a Commission hearing on December 11, 1968, where there was no opposition to the certification, CIG stipulated to operate the New Company under its present rate and tariff structure and to refund any revenues collected above the level subsequently determined to be legal by the Commission in a separate rate proceeding. The New Company's principal customers have agreed to this arrangement.

<sup>1</sup>The court permitted El Paso to retain its investments in the realty company which owns the Northwest Division headquarters building in Salt Lake City and in Phillips Pacific Chemical Co. (J.S. App. 129-130).

At the Commission's hearings it was announced that the New Company and CIG have agreed with the principal wholesale gas buyers in the southern California area that the New Company will attempt to develop a project for delivery of gas to California by November 1973.<sup>8</sup> The agreement provides for feasibility and engineering studies, permanent commitments if the project is feasible and other steps required to initiate the endeavor and obtain Federal Power Commission approval for it.

#### ARGUMENT

After extensive hearings the district court adopted a plan providing for the most expeditious divestiture presently possible of El Paso's illegally acquired assets. The terms of the divestiture plan fully comply with and implement the guidelines set forth in this Court's *Cascade* opinion (see the Statement, *supra*, pp. 4, 7-10). Indeed, the appellant does not contest those terms in any particular, but limits its challenge to the court's choice of CIG, rather than one of the other applicants, to acquire the Pacific Northwest properties. As we show below, on this record there is no reason to overturn that selection. The divestiture to CIG restores a major competitive force to the California market—which was the objective of the government's suit against the merger and of this Court's decisions in the case—and terminates this

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<sup>8</sup> The agreement was with Southern California Edison Company, Pacific Lighting Company (which controls Southern California Gas Company and Southern Counties Gas Company) and the City of San Diego, and it has been disclosed to the Attorney General of California and the California Public Utilities Commission. A copy of this agreement, which is an exhibit in the Commission's proceedings, has been lodged by the government with the Clerk of this Court.

protracted litigation in time for the divested company to surmount the growing barriers to entry of the California market. Accordingly, the decree should be affirmed.

1. THE DIVESTITURE DECREE RESTORES TO THE CALIFORNIA MARKET A COMPETITIVE FORCE WHICH WAS ELIMINATED BY THE MERGER

The divestiture to CIG creates a strong new competitive force for the California market. The combination of the New Company and CIG will have the ability and resources to compete for new increments of demand in California.<sup>9</sup> In fact, following the decision of the district court, CIG entered into an agreement (see Statement, *supra*, p. 11) with the major users of natural gas in California specifying that the New Company will undertake the steps necessary to attempt a project for delivery of gas to California by November 1973. This agreement thus inaugurates a direct competitive effort by the New Company to serve that market. It also has the apparent approval of the California gas buyers, and the State itself—the interests most directly affected by the California competitive situation and which challenged in this Court the prior consent decree.<sup>10</sup>

<sup>9</sup> As this Court recognized in *El Paso*, competition in the natural gas industry is not a struggle for current sales. Once a pipeline is constructed and certificated it will meet requirements for a very long period of time; the segment of demand thus satisfied is no longer subject to competition by other pipelines. Therefore, competition is limited to meeting new increments of demand as they emerge. See 376 U.S. at 659-660.

<sup>10</sup> Following negotiation of this agreement, the People of the State of California and Southern California Edison Co. withdrew their notices of appeal and the Southern Companies (Southern California Gas Co. and Southern Counties Gas Co.) have filed a motion to affirm.

Since there was no opposition before the Federal Power Commission to the New Company's application for permanent certification to operate the Northwest Division, it seems likely that the Commission will issue such a certificate soon after the termination of this litigation (F.P.C. Docket CP 69-67) and the New Company can then promptly begin work on its commitment with respect to a California project. But if the case is again remanded for additional litigation, the likelihood that any purchaser will be able to attempt entry into California will be greatly diminished because of the changing market situation (see *supra*, p. 7; *infra*, pp. 14-15) and the substantial time needed to mount a project.

Despite the fact that the divestiture decree creates a strong new competitive force for California, appellant's principal argument is that the decree should be set aside because it will adversely affect competition (between CIG and the New Company as potential competitors) in the California market (J.S. 20-26). It is difficult, however, to see what interest the appellant has in the alleged effect of the decree in the California market. The appellant does not show how it, the State of Utah, or any of that State's citizens or residents would be adversely affected by the decree's alleged foreclosure of competition in California.

The government argued below that CIG should be considered a potential competitor for the California market since it has gas reserves in the Rocky Mountain basins, it was an established, experienced, conservatively financed company, and it apparently had the incentive to enter California. See *United States v. Penn-Olin Chemical Co.*, 378 U.S. 158, 172-177. As the district court found (J.S. App. 101), however, other

considerations make independent entry by CIG into California speculative and in any event much less likely than in conjunction with the New Company. CIG has diversified into other fields (see CIG Divestiture Plan, Ex. 1, pp. 2, 6-10), and the Federal Power Commission imposes limitations on the rate of return in pipeline operations. Furthermore, substantial expenditures are necessary before a proposed project can be submitted to the Commission, and this investment will be lost if the project is disapproved. These factors reduce the incentive for CIG to propose a California project, and, with the exception of the unsuccessful Rock Springs venture with El Paso, CIG has not in the past sought to do so.

The changes in the California market which have occurred since El Paso acquired Pacific Northwest further limit the attractiveness of that market to a potential competitor. At that time, El Paso was the only out-of-state natural gas supplier in the California market. Today, California is supplied by three strong interstate pipeline companies: El Paso, Transwestern Pipeline Company and Pacific Gas Transmission Company.<sup>11</sup> In addition, the Federal Power Commission recently authorized El Paso to construct new pipeline facilities which will enable it to bring additional natural gas into California and has authorized Pacific Gas Transmission to bring additional Canadian gas to Northern California (F.P.C. Docket CP 67-187, *et al.* (October 30, 1968)). Transwestern

<sup>11</sup> This change in the California market was noted by this Court in *El Paso* as evidence of the opportunities which would have existed for Pacific Northwest had it not been acquired by El Paso. 376 U.S. at 661.

also has a pending application to deliver additional gas to California (F.P.C. Docket CP 67-181).<sup>12</sup>

In these circumstances, CIG's somewhat dubious effectiveness as a potential competitor in California did not conclusively disqualify it as an applicant, in view of CIG's submission that a combined CIG-New Company would be significantly more likely actually to compete for entry into the California market than would either company standing alone. Although, as we said below, we believe that the district court's findings should have reflected a more searching comparison of the merits of all the applicants, we do not believe this decree warrants plenary review by this Court. The agreement with the California interests, subsequent to the court's decision, and their apparent satisfaction with the divestiture, indicate that the overriding public interest in promptly restoring competition for the California market will best be served by affirming this decision.

2. THERE IS NO FOUNDATION IN THE RECORD FOR APPELLANT'S SUGGESTION THAT THE DECREE MIGHT HAVE SIGNIFICANT ANTICOMPETITIVE EFFECTS IN ANY OTHER MARKET

The appellant questions the effect of the selection of CIG on competitive conditions in the sale of natural gas in Utah and western Colorado (J.S. 30-31) and in the acquisition of gas reserves in Wyoming (J.S.

<sup>12</sup> These increments are expected to meet California's near term demand but not its projected long term requirements (see opinion of Chairman White, dissenting in part, Docket CP 67-187). However, projections as to new increments of demand for the mid and late 1970's are uncertain and must be discounted in some degree by the possible construction of nuclear power plants and a possible slowdown in the rate of California's growth.

27-30). The former contention clearly relates to the appellant's interest as an intervenor in this case. But the appellant offered no evidence in the district court relating to the probable effects of the decree in the Utah market and can point to no basis in the record or in the district court's findings for its present contention.<sup>13</sup> In the absence of record support for appellant's speculative assertions concerning possible future effects of the decree in the Utah market, there is no reason to displace the district court's considered judgment that the transfer of the properties to CIG will best effectuate the overall purpose of the lawsuit in restoring Pacific Northwest as a viable competitor in the California market.

Appellant's interest in the possible lessening of competition between CIG and the New Company for gas reserves in Wyoming is less apparent, in view of the fact that competition among buyers tends to raise, rather than lower, prices.<sup>14</sup> It is possible that appellant's concern here (which is not disclosed in the Jurisdictional Statement) is with the possibility that the decree might have an adverse effect on the devel-

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<sup>13</sup> Mountain Fuel Supply Company, the principal supplier in Utah, provides approximately one-third of its needs internally, purchases another third from other producers, and obtains the remainder from pipeline companies, including CIG and the New Company (Mountain Fuel Supply Company, Annual Report for 1966, pp. 2-8). Mountain Fuel's purchases from CIG are insignificant, however, and are made under a short-term contract which expires in 1969 (Tr. 2648, 3071, 3187). By contrast, in 1968 it purchased over \$4.5 million worth of gas from New Company. Mountain Fuel, which is a party in the present case, has not objected to the proposed divestiture plan.

<sup>14</sup> See, generally, *Permian Basin Area Rate Cases*, 390 U.S. 747, 793. The Federal Power Commission has established maximum prices for the Wyoming reserves. *Humble Oil & Refining Co.*, 24 F.P.C. 191 (1960), reaffirmed in *Western Transmission Corp.*, 31 F.P.C. 1295 (1964).

opment of gas reserves in Wyoming which could be used to serve consumers in Utah. Once again, however, the appellant offered no evidence in the district court to indicate that the decree might have such an effect. On the present record, it is at least equally plausible to infer that the planned project of CIG and the New Company for entry into the California market will provide greater incentive for acquisition of new gas reserves in Wyoming than would any presumed possible competition between CIG and the New Company.<sup>15</sup>

### CONCLUSION

Appellant has not provided any factual basis in this record for its claim that the combination of Pacific Northwest and CIG will have an adverse effect on competition in those markets in which it has a valid interest. The divestiture approved by the district court would create a strong and viable potential competitor for the California market upon terms that meet the standards for divestiture announced by this Court in *Cascade*. Appellant's speculative and conjectural claims of competitive injury in other markets provide no basis for overturning the district court's considered judgment that the acquisition of Pacific Northwest by CIG provides the best prospect for restoring in the California market the competition that was eliminated almost twelve years ago by the illegal merger. The judgment of the district court

<sup>15</sup> There is, moreover, no indication in the record that CIG has any history or prospect of competing in the Northwest market. Because of the proximity of large supplies of Canadian gas and FPC area price rulings, Rocky Mountain gas is not competitive in the Northwest. (Tr. 3088-3089.)

approving the divestiture plan should be affirmed.  
Respectfully submitted.

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FEBRUARY 1969.